



March 12, 2008

Hon. Ross Johnson, Chairman
Commissioners Remy, Huguenin, Leidigh & Hodson
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

RE: Informational Hearing On Enforcement – April 12, 2008

Dear Chairman Johnson and Commissioners:

The California Political Attorneys Association (“CPAA”), by its Enforcement Task Force, submits this comment for your consideration in connection with the *Informational Hearing on Enforcement*, that will take place at the conclusion of the April 12, 2008 Commission meeting. The CPAA is an association of over 100 lawyers who devote a significant portion of their practices to campaign finance regulation, election law and governmental ethics. Many of us represent clients who are involved in the enforcement process at the Commission, and have done so since the beginning of the Commission. Others are former staff and Commissioners of the FPPC. In short, we possess a broad perspective on FPPC enforcement policies. Since its inception in 1988, the CPAA has determined to play a constructive role in urging the Commission periodically to discuss publicly its approach to and perspective on the enforcement process, and to review its enforcement procedures, and to offer comments that reflect a long view of the process, to help ensure an enforcement process that is fair and transparent.¹

The CPAA’s members look forward to the Commission staff’s discussion of the current enforcement process, and the Commission’s broader discussion on how best to accomplish its goals of vigorous and fair enforcement of the laws while affording due process to participants and remaining mindful that the Commission acts in an area that touches closely on First Amendment rights of speech and petition.

¹ While this represents a consensus of CPAA members, we have encouraged CPAA members to offer their own perspectives on the enforcement process, particularly if their perspective differs from those presented here.

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Given the unprecedented expertise of the current Commission in these matters, we believe that a unique opportunity exists for a meaningful dialogue about the enforcement process. Each of the recommendations set forth below reflects a consensus view of the enforcement process as we understand it and believe it should operate. In reaching this consensus we relied upon the recommendations of the Bipartisan Commission on the Political Reform Act Report (discussed below) and several important recent appellate court cases.

The CPAA's members have read press stories about a number of recent developments concerning the Commission's policies with respect to commenting to the press about pending enforcement complaints and making public copies of such complaints. CPAA members also have read press reports about the Commission's intent to focus upon more serious violations for enforcement attention, and its issuance of a significant number of "warning letters" in lieu of fines. We have also heard directly from Chairman Johnson, who spoke at a recent CPAA meeting concerning his views on enforcement priorities. We hope the informational hearing will offer some elaboration on what the FPPC actually is doing, and its policy justification for this activity. While much of the activity strikes us as positive, we feel we do not have complete information about many of the changes, and look to the hearing, and subsequent actions and discussions, to obtain fuller information.

This comment letter addresses three specific subjects: (1) support for the Commission adopting Recommendation 24 of the Bipartisan Commission on the Political Reform Act of 1974 Report, referred to herein as the McPherson Report, which urged the Commission to adopt publicly a Statement of General Enforcement Principles; (2) specific recommendations necessary to ensure a fair and due-process oriented enforcement system, taking into account Public Records Act requirements; and (3) suggestions as to a general approach to dealing with the separation of functions and due process standards set forth in the *ABC Appeals Board v. Alcoholic Beverage Control Board* case, and at issue in the *Morongo Band of Mission Indians v. State Board of Control* case now pending in the California Supreme Court.

1. Support for Recommendation 24 of the McPherson Commission Report.

The McPherson Report, issued over five years ago, covered a broad range of recommendations on different aspects of the Political Reform Act.

Among the recommendations were twelve recommendations concerning the Commission's enforcement policies and practice. Several of these recommendations required legislative action, and one concerned personnel recruitment. The balance, including Recommendations 24, 29, 31, 32 and 33, concerned issues which were matters of Commission policy and did not appear to require legislative changes to enact. The focus of this comment is upon Recommendation 24 – that the Commission adopt publicly a Statement of General Enforcement Principles. The second comment includes matters touched upon in Recommendation 32 (subjects of FPPC complaints should be promptly notified and given opportunity to respond) and Recommendation 33 (respondents in enforcement proceedings should have an opportunity to view the evidence against them).

In Recommendation 24, the McPherson Report identified a number of general principles that the Commission should embrace. These general principles are straightforward, and make common sense: The enforcement process should seek (a) to deter serious or intentional violations; (b) to detect and punish the un-deterred; (c) to encourage those who have consciously and diligently attempted to comply with the Act; and (d) to adopt a penalty structure consistent with this approach.

The McPherson Report recommended that this categorization should focus upon, at the serious end of the spectrum, intentional violations of the Act undertaken for political advantage and attempts to conceal such violations. The categorization included, at the much less serious end of the spectrum, inadvertent violations made by those diligently attempting to comply with the Act without concealment of such violations. The Report acknowledged the most serious challenge was to deal appropriately with “middle ground cases” – those involving non-diligent conduct and non-intentional violations. The Report urged the Statement of General Enforcement Principles to adopt a flexible approach to the prosecution and imposition of fines in such cases, based on (a) amounts not properly reported; (b) the relative nature of violation to the respondent's total activity; (c) the proximity of violation to the election itself or to a governmental decision; and (d) the level of sophistication of the violator.

The McPherson Report emphasized the importance of this case categorization to the choice of enforcement tools and remedies the Commission can employ. It recommended that middle ground cases be handled administratively, and not through civil or criminal enforcement, that audit finding cases and straightforward, unconcealed minor violations should be handled expeditiously, that a “warning letter” approach should be considered

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where appropriate, and that cases warranting fines should be handled like parking ticket/infractions where possible.

We believe it would be useful for the Commission to begin with the suggestions contained in Recommendation 24 and review its enforcement strategy with the goal of attempting to categorize offenses in terms of the degree to which the Commission deems them to be “serious” (and therefore warranting more formal enforcement proceedings) and applying prosecutorial resources and penalties in a manner that is consistent with the Commission’s categorization and enforcement priorities.

We acknowledge that the Commission appears to have responded in part to the thrust of the McPherson Report recommendations by adopting a streamlined approach to dealing with some violation cases, in particular for major donor and late-contribution report late filings and non-filings. The Commission has also discussed, in the context of considering a possible “diversion program” for violation of less-serious provisions of the Political Reform Act, categorizing additional types and levels of violations of the Act as worthy of non-fine disposition. While this approach was not adopted, the Enforcement Staff did catalog a number of offenses it considered less serious violations for purposes of potential diversion. The Commission should review the Enforcement Division’s list of such violations – contained in the October 10, 2006 Memorandum to Commissioners from then Enforcement Chief Bill Williams and Technical Assistance Division Chief Carla Wardlow.

The Commission also apparently has adopted an approach consonant with the thrust of Recommendation 24 by issuing “warning letters” in lieu of minor fines. We say “apparently” because this information became better known to us in a February 27, 2008 Los Angeles Times article which identified 294 cases disposed of by “warning letters.” Some of the CPAA’s members have received warning letters on behalf of their clients but the extent of the use of this approach was unknown to us. While we approve generally of this development, we hope the informational hearing will elaborate on the policy rationale for this more expansive use of the “warning letter” process and the types of cases to which it has been applied, and allow for a broader public discussion and understanding of the Commission’s enforcement priorities and approach.

In summary, we urge the Commission to publicly consider and adopt a Statement of General Enforcement Principles. Such a Statement would be a guide to future Commissions and staff of the Enforcement Division.

2. Recommended Process Improvements for FPPC Administrative and Civil Enforcement

CPAA believes that the following elements should be included in any enforcement procedures, and that these elements represent adherence to the statutory requirements as well as a reasonable balance between the need to proceed expeditiously on complaints and afford due process to respondents.

- (a) Adopt clear rules regarding confidentiality of complaints and other investigatory documents and release of such documents to the press or in response to Public Records Act requests. The Commission should also address whether any communications made by the Commission to complainants pursuant to Government Code section 83115 are confidential. If the Commission is to allow anonymous complaints, elaborate on circumstances that will justify such confidentiality.
- (b) Respondents should receive a copy of the complaint filed against them, including the substance of any anonymous complaints. Exceptions, if allowed, should be clear and limited. Where the Commission staff determines to initiate a complaint, a summary of the allegations that staff has determined to investigate should be provided to Respondents.
- (c) The 14 day statutory period should only be used to determine whether the FPPC has jurisdiction and whether the facts, if correct, state a violation of the PRA. If the Commission determines within 14 days that it does not have jurisdiction or if the facts as alleged, even if true, would not constitute a violation of the PRA, then the Commission shall notify both the complainant and respondent in writing of this finding. Otherwise the Commission shall notify the complainant in writing that it has received the complaint, intends to notify the respondent in writing and afford the respondent an opportunity to respond to the complaint. The respondent should receive notice of this communication to the complainant. There should either be no opportunity to appeal this determination, or both the complainant and respondent should have a right to appeal. The notice to the complainant, or any FPPC public comment on a pending complaint, should include a statement that the

presumption of innocence applies and the Commission action should not be interpreted as a finding that a violation has occurred or that the respondent has committed a violation.

- (d) The subject of the complaint should be given a brief time (10-14 days) in which to respond. The complainant should be advised that respondent will be given this opportunity. Upon receipt of the response by the respondent or the lapse of the response period, a pre-probable cause procedure should be employed to determine whether the Commission shall investigate the complaint, issue a warning letter or otherwise decline to exercise its prosecutorial discretion.
- (e) The Commission should be required to make a probable cause determination before consideration of initiating civil litigation, and provide respondent with opportunity to address the memorandum in support of civil litigation.
- (f) In connection with the probable cause report, the Commission should make available any documents or evidence upon which the determination is based.

3. Separation of Functions and Due Process Recommendations

One of the CPAA's longstanding concerns about the "unitary" agency process is that the Commission serves as "prosecutor, judge and jury" of administrative enforcement matters. There is potential for due process conflicts in such mixed roles, and quite a bit of anecdotal past evidence of such problems with the agency's enforcement practices.

In recent years, California's appellate courts have focused on due process and "separation of function" problems that can arise in the unitary agency context that may result in *ex parte* communications outside the record of administrative hearing cases and which present the potential for bias in the decision-making process.

In *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, 40 Cal.4th 1 (2006) ("ABC case"), the California Supreme Court held that the Administrative Procedure Act's prohibition against certain *ex parte* contacts between an agency's decision-makers and employees requires a separation of functions between the agency's decision-makers and its employees engaged in both advocacy and decision-making

for the agency. (See Gov. Code § 11430.10, subd. (a); § 11430.70, subd. (a); and exceptions in §§ 11430.20, subd. (b) and 11430.30, subd.(a)). The Supreme Court affirmed the general rule in a case involving *ex parte* contacts in connection with a particular adjudicative case, but the holding is broader. Recently, the Third District Court of Appeal in *Morongo Band of Mission Indians v. State Board of Control*, rev. granted, 67 Cal.Rptr. 3d 465 (2007), disqualified an agency attorney from participating in an administrative hearing and also acting as an advisor to the agency in question in an unrelated proceeding. The Court found the arrangement violated the APA's separation of functions requirements. This decision was vacated upon grant of review by the Supreme Court in late 2007. At a minimum, the current law would appear to require avoidance of *ex parte* communications between an agency employee involved in prosecutorial functions and the agency decision-makers in a particular case, except on certain non-substantive procedural matters.

We believe it would be useful for the Enforcement Staff to outline the current responsibilities of Commission personnel in the enforcement process and offer its own assessment of the two cases and the Staff's view of what they would require, in light of the current responsibilities of Commission personnel.

The CPAA understands that the Commission has decided that the Executive Director should be actively involved in the decisions to initiate and prosecute enforcement matters, so the question of whether the Executive Director ought to be involved in this way is not part of this discussion and recommendations. These recommendations assume that this decision has been made, or certainly could be made by future Commissions, and thus we suggest approaches to deal with the *ex parte* and separation of functions due process issues addressed by the court decisions above.

The CPAA's three recommendations with respect to this separation of functions issue are as follows:

First, the Commission should examine the separation of function problems presented by its current procedures and, by regulation or written policy, adopt procedures to avoid, and if not possible to avoid, to cure, any *ex parte* communications between the prosecutorial staff and decision-makers (whether at the probable cause, pre-civil litigation, noticed stipulation, or administrative hearing stages) of any enforcement case.

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Second, if by policy or current practice, the Executive Director will be involved in enforcement caseload management or prosecutorial decision-making, the Commission should reconsider its delegation of probable cause decision-making to the Executive Director, which in turn allows the Executive Director to make discretionary sub-delegations. Instead either the Commission itself, as provided for in section 83115.5, or through delegation to a neutral hearing officer who is not under the supervision of the Executive Director, should conduct the Probable Cause hearing.

Third, to the extent required by the Supreme Court in its *Morongo* decision, the Commission should consider restructuring its enforcement processes, by regulation and policy if possible, but by legislation if necessary, to effect a separation of functions between enforcement prosecutors and enforcement decision-makers (at the four stages of enforcement proceedings listed above.)

We look forward to the April 2008 *Informational Hearing on Enforcement*, and to answering questions about these recommendations.

Very truly yours,


On Behalf of the CPAA Enforcement Task Force

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